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No. 95-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial District

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In its opening brief, using the traditional methods of statutory construction, petitioner demonstrated that 49 U.S.C. § 20302(a)(1)(A) plainly does not impose liability on a railroad for a back injury incurred by an employee while aligning a drawbar that is not defective. Respondent, who ignores the statutory text completely in favor of arguing that as a matter of policy the employee must always recover for injuries if he is standing between two cars, has failed to justify his sweeping extension of the SAA. Accordingly, the judgment of the court below should be reversed.

Respondent's broad theories of liability under § 20302 of the SAA clash with a reasonable reading of the plain language of the statute, its legislative history, applicable regulations, and this Court's precedents. A railroad need not develop automatic realigning technology for drawbars in order to avoid strict liability for employee injuries at-

tributable in any way to drawbar misalignment. When an employee is injured going between two cars to straighten a misaligned drawbar, it should be a complete defense to liability under the SAA that the railroad's coupling equipment was not defective. Alternatively, the issue might be whether the railroad in any way acted negligently and, if so, whether the employee was contributorily negligent. But that issue arises only under the Federal Employers Liability Act ("FELA"), which respondent did not raise in this case.

1. The Plain Language Of § 20302(a)(1)(A) Focuses On Safety Equipment And Does Not Bar Employees From Going Between Two Railcars.

While respondent focuses intently on legislative history and broad statutory purpose as the means of interpreting the SAA, he neglects the first principle of statutory interpretation. In a brief with almost as many block quotations as pages, respondent noticeably fails to quote the relevant statutory language. The plain language of the statute focuses on the equipment a railroad carrier must have installed on its cars: "[A] railroad carrier may use or allow to be used on any of its railroad lines . . . a vehicle only if it is *equipped with* . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles . . . ." 49 U.S.C. § 20302(a)(1)(A) (emphasis added). Even the Act's title refers to safety *appliances*, not safety operations.

This statute does not describe operating procedures, and pointedly does not outlaw employees performing tasks between two cars. The relevant statutory language focuses on safety equipment, not on the operating procedures of coupling and uncoupling. In 1893, when the SAA was enacted, the process of coupling and uncoupling cars was performed by employees standing between two moving cars, and thus Congress described that process in § 20302 in explaining what equipment was mandated. There is no

explicit or implicit prohibition in the statutory words against the simple act of going between two cars.

2. The SAA's Legislative History Establishes That Congress Did Not Intend To Prohibit Employees From Going Between Two Cars, But Instead Intended To Improve The Equipment Installed On Railcars.

Respondent relies unpersuasively on limited materials in the SAA's legislative history to argue that the statute absolutely bars employees from going between cars "for purposes of the process of coupling and uncoupling," Resp. Br. 17, making railroads liable for any injury incurred by employees going between cars during this "process."

The SAA's legislative history demonstrates that Congress was fundamentally concerned about requiring that certain safety equipment be installed on railcars. Congress was not addressing operating procedures, and did not intend to bar employees from going between two cars to perform their duties. Instead, Congress deliberated on what type of equipment would reduce the need to go between cars routinely and thereby decrease the number of railroad casualties. See, *e.g.*, 24 Cong. Rec. 1248 (1893) (statement of Sen. Gorman); 24 Cong. Rec. 1275 (1893) (statement of Sen. Cullom). For that reason, Congress decided that couplers should be automatic and nationally uniform. H.R. Rep. No. 1678, 52d Cong., 1st Sess. 3 (1892); S. Rep. No. 1049, 52d Cong., 1st Sess. 4, 5 (1892).

Congress was particularly concerned about the danger arising out of nonuniform equipment when employees actually coupled and uncoupled the cars. Resp. Br. 6, 13 (citing H.R. Rep. No. 1678, 52d Cong., 1st Sess. 3 (1892)). The exchange from the Senate hearings which respondent quotes supports this point: The Chairman of the Senate Interstate Commerce Committee asked if, upon passage of the bill, there will be "any necessity for a

switchman *to go between the cars at all in order to couple or uncouple the cars,*" and the bill's author stated that there will not be. Resp. Br. 14 (quoting S. Rep. No. 1049, 52d Cong., 1st Sess. 14 (1892)) (emphasis in original and added). The House report called coupling and uncoupling "the chief danger" faced by railroad employees. H.R. Rep. No. 1678, 52d Cong., 1st Sess. 3 (1892).

As explained in the opening brief, Congress expressed particular concern about employees standing between two moving cars as they were being coupled or uncoupled. See 49 U.S.C. § 20302(a)(1)(A); see also 24 Cong. Rec. 1280 (1893); 24 Cong. Rec. 1367 (1893). This situation was extraordinarily dangerous and many employees lost their lives because cars lacked safe coupling equipment prior to passage of the SAA. Congress was not concerned about employees standing between two stationary cars *preparing* them for coupling. Thus, the legislative history focuses on the risk of employees being crushed between two moving railcars, not on the risk of a back injury when aligning a nondefective drawbar when the railcars stood still, several lengths apart, which is the situation here.[1]

Nevertheless, respondent asserts that "Congress intended to eliminate the dangers attendant to working between

[1] The case respondent cites to show that § 20302 applies to more than coupling and uncoupling, Resp. Br. 11 (citing *Coray* v. *Southern Pac. Co.*, 335 U.S. 520 (1949)), is inapposite. That case centers on brakes, not drawbars, and *defective* brakes at that, in extending a railroad's duty of care to an employee injured by a moving train. There is no mention of coupling and uncoupling, and, indeed, the Court stressed that "[l]iability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited *defective equipment* . . . ." 335 U.S. at 523 (emphasis added). In the case at bar, petitioner's railcars were equipped with *nondefective* equipment of the type required by the SAA. Absent a violation of the SAA or a claim of negligence under the FELA, there is no basis for imposing liability on the railroad.

cars, and it didn't matter whether or not the equipment was defective. These dangers are what Congress addressed, not the type of equipment used to accomplish the mandate." Resp. Br. 4. But, to the contrary, Congress's concern in the *Safety Appliance Act* was on what equipment was needed: it declared in the statute that cars "must be *equipped with*" automatic couplers. 49 U.S.C. § 20302(a)(1) (emphasis added). This language caused the railroad industry to change from myriad styles of link-and-pin and automatic couplers to uniform, automatic couplers. See Pet. Br. 3-5.

Congress has also enacted 49 U.S.C. § 20131, directing the Secretary of Transportation to prescribe regulations for the safety of railroad employees who "have to work on, under, or between [rolling] equipment." The existence of this provision, which respondent and his *amicus* simply chose not to reconcile with their expansive interpretation of § 20302, demonstrates that Congress did not intend, as respondent repeatedly asserts, to make it a violation of the SAA for employees to go between two cars.

3. FRA Regulations Plainly Envision Employees Going Between Cars To Perform Their Jobs, Reflecting Congressional Intent To Regulate Equipment, Not Operations.

Consistent with the manifest expectation that employees would go between cars, the Federal Railway Administration's ("FRA") regulations envision employees going between two cars to adjust couplers. See 49 C.F.R. §§ 218.22, 218.39(a).[2] The FRA's understanding embodied in these regulations—that employees would go between two railroad cars—is inconsistent with liability for railroads under the SAA for injuries to employees who have gone between cars to prepare for coupling.

[2] Although these regulations technically reference the Federal Railroad Safety Act and not the SAA, the Secretary of Transportation is responsible for regulations "for every area of railroad safety." 49 U.S.C. § 20103.

Respondent answers that "a violation of the SAA does not necessarily mean that a FRA regulation issued pursuant to the SAA is violated." Resp. Br. 17. But this odd contention is entirely beside the point. Petitioner's argument is that the existence of certain FRA regulations demonstrates that operations requiring an employee to go between two cars are not *per se* impermissible. Pet. Br. 15-17.[3]

4. This Court's Decisions Interpreting § 20302(a)(1)(A), Particularly *Affolder*, Show That A Railroad Has A Good Defense To Liability When An Employee Is Injured Realigning A Nondefective Drawbar.

Respondent misinterprets this Court's precedents under § 20302(a)(1)(A), as holding that employees may not go between two cars to prepare couplers for coupling. He argues that, under this Court's cases, the requirement that a coupler be properly set demands that setting the coupler must be performed without an employee going between the cars.[4]

Respondent's arguments must fail in light of *Affolder*, which holds that a railroad cannot be held *per se* liable

[3] In *United Transportation Union* v. *Lewis*, 711 F.2d 233 (D.C. Cir. 1983), the D.C. Circuit upheld an FRA regulation. In a footnote the court observed that, while a coupler may not be defective "within the meaning of FRA *regulations*," a railroad may still be liable for injuries sustained in manually preparing it for coupling. *Id.* at 236 n.6 (emphasis in original). In the abstract, petitioner has no quarrel with that statement. If the railroad is negligent and the employee is injured, then there could be liability. But if there is no violation of the regulation, there would be no *strict* liability.

[4] Under respondent's theory, presumably an employee who was injured while standing between two cars opening a coupler, even though he could have done so from outside the cars, would be entitled to recover under the SAA. This result makes apparent the arbitrariness of making liability under an equipment statute turn on the employee's location. The better rule—and the rule mandated by the statute—is to focus solely on the equipment itself.

for an employee injury if the coupling mechanism was not "properly set" and had no chance to couple. *Affolder* v. *New York, Chicago & St. L.R.R.*, 339 U.S. 96, 99 (1950); *id.* at 101 (Jackson, J., dissenting). Respondent is simply wrong to state that, "[i]f the couplers do not couple automatically by impact (*for whatever reason*, whether defective or not) . . . then Section 2 of the SAA is violated." Resp. Br. 4 (emphasis added). *Affolder* makes clear that, if the coupler was not "placed in a position to operate on impact," the railroad has "a good defense." *Affolder*, 339 U.S. at 99.

This Court in *Affolder* did not, explictly or implicitly, limit this principle to placing a coupler in a position to couple automatically only by an employee standing outside the car. This Court made no distinction between going between cars or not; it merely required that the coupling mechanism be "properly set." In that case, a knuckle was closed, or not "properly set," and in this case a drawbar was misaligned, or not "properly set." *Affolder* thus properly limits liability under the SAA to matters that involve flawed equipment, which the SAA outlaws, and did not discuss operating procedures. The coupler here was not flawed, and, therefore, recovery under the SAA is not available.

"Properly set" means set so that cars can couple; it does not mean set so that cars can couple as long as no one had to go between the cars to prepare them for coupling. This Court simply made no such distinction in *Affolder*. Further, "properly set" does not just mean that one or both knuckles are open. United Transportation Union ("UTU") *Amicus* Br. 9. Cars are also not properly set to couple if their drawbars are misaligned; the cars will not couple together on impact. If a car had derailed, the coupler would again not be "properly set" to couple, but there would surely not be strict liability under § 20302 of the SAA for injuries incurred by employees going between two cars to retrieve the derailed car.

Liability to employees under the SAA "springs from its being made unlawful to use cars not equipped as required —not from the position the employee may be in or the work which he may be doing . . . ." *Louisville & Nashville R.R.* v. *Layton*, 243 U.S. 617, 621 (1917). This Court's precedents, particularly *Affolder*, demonstrate that, if a railroad shows that its coupling equipment was nondefective, that will defeat a claim under § 20302 of the SAA. This Court's cases pointedly do *not* suggest that, if an employee goes between two cars to align a drawbar in preparation for coupling, the railroad will be liable for any injury incurred.

Respondent and its *amicus* maintain that a railroad employee must not be forced to prove a coupler was defective in order to recover under the SAA for injuries incurred while manually moving a drawbar. Resp. Br. 5, 6, 8, 11-13, 20; UTU *Amicus* Br. 4, 7-8. Petitioner is not arguing that a railroad employee specifically must prove a "defect" in his prima facie case. But ultimately he must prove a violation of the SAA. And certainly a railroad should be able to show that the coupler was merely misaligned in a manner that does no violence to the SAA. Pet. Br. 19-20.

Thus, although a railroad employee need not prove a defect in order to recover any more than he must show the coupler was open, a railroad at a minimum should be able to demonstrate the lack of such a defect as a defense. Respondent argues that there was "not one word in the hearings, the Congressional reports, nor the Congressional floor debate to the effect that the coupler must be defective before a violation exists." Resp. Br. 6-7, 12.[5] However, if a railroad's coupling mechanism is just what is called for by the statute and regulations, without any

[5] In fact, respondent's broad statement is incorrect. *See* 24 Cong. Rec. 1277 (1893) (statement of Sen. Hunton) ("[I]f the machinery used by the railroad company is defective, and that *by reason of the use of that defective machinery* [an] accident occurs by which a passenger or employe[e] is killed or wounded, the railroad company is responsible.") (emphasis added).

defect or abnormality, the railroad should not be held *strictly* liable for injuries incurred by employees working with the mechanism. If a coupler was not "placed in a position to operate on impact," the railroad has "a good defense." *Affolder* v. *New York, Chicago & St. L.R.R.*, 339 U.S. 96, 99 (1950). Accordingly, where, as here, it is undisputed that the railroad's coupling mechanism was not defective—it was merely out of alignment—there is no basis for imposing strict liability. Instead, the burden should be on the employee to show that the railroad was in some way negligent, a burden respondent steadfastly refused to shoulder by choosing not to sue under the FELA.

The UTU argues that a "mechanically perfect coupler which fails to perform as required violates the Act." UTU *Amicus* Br. 4. This cannot be the rule after *Affolder*; that is precisely what happened in that case and this Court held that the railroad had a good defense. Such a result is the only sensible one: A nondefective or "mechanically perfect" coupler, by definition, performs as the SAA requires and complies with the Association of American Railroads ("AAR") guidelines.

Finally, contrary to respondent's argument, Resp. Br. 20-23, *Atlantic City R.R.* v. *Parker*, 242 U.S. 56 (1916), and *San Antonio & Aransas Pass Ry.* v. *Wagner*, 241 U.S. 476 (1916), demonstrate that a misaligned drawbar is not *per se* a violation of the SAA. Although on the facts in those cases this Court found that a jury could infer that the drawbars had too much lateral play and were defective, it notably did not hold that as a matter of law the railroads were liable under the SAA.

Ultimately, this Court has found that a railroad cannot be held strictly liable under the SAA if the coupling mechanism was not set properly and had no chance to couple. *Affolder*, 339 U.S. at 99. The railroad has a "good defense" in such a case. *Id.* This is such a case.

5. Section 20302 Does Not Cover Injuries Incurred When Aligning A Drawbar Where The Railroad Had Non-defective Coupling Equipment In Place.

As a practical matter, drawbars must be in alignment for automatic coupling to occur on impact. Drawbars may occasionally become misaligned due to normal movement of railcars, because of the lateral play necessary to avoid cars derailing on curves. Realignment can only be accomplished by a railroad employee going between the rails to align the drawbars manually.

Respondent declares, in a novel argument, that the SAA required railroads, in 1893, to develop self-aligning drawbars. Resp. Br. 24, 26-27; UTU *Amicus* Br. 17. As respondent's *amicus* concedes, "[c]ertainly, the act of going between the ends of railroad cars could not be prohibited, otherwise railroad movement would come to a grinding halt since there is no other procedure for realigning drawbars." UTU *Amicus* Br. 12; Resp. Br. 3. Nevertheless, respondent argues that railroads must assume any risk of injury to employees straightening drawbars if they are not utilizing devices that will align drawbars automatically.

In fact, § 20302(a)(1)(A) of the SAA does not require railroads to develop self-aligning devices. The SAA requires automatic *coupling*, not automatic *realignment*: "[A] railroad carrier may use or allow to be used on any of its railroad lines . . . a vehicle only if it is equipped with . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles . . . ." 49 U.S.C. § 20302(a)(1)(A). The purpose of this section is to ensure that coupling devices will function on contact so that employees need not perform the dangerous task of going between moving cars to couple (or uncouple) them manually.[6] The industry had no responsi-

[6] The UTU suggests that petitioner has proposed a change in the law. UTU *Amicus* Br. 16. In fact, it is respondent who seeks

bility to develop such devices, contrary to respondent's suggestion, Resp. Br. 9, because these devices were not required by the statute.

Respondent and *amicus* each alleges, without any supporting citations, that railcars and drawbars are now made longer than in 1893 and thus drawbar misalignment has increased since passage of the SAA. Resp. Br. 3; UTU *Amicus* Br. 16-17. It does not follow from these assertions that the SAA requires railcars to be equipped with self-aligning drawbars. Congress could have dealt with this situation if it had felt there was a substantial danger to railroad employees, or the UTU could have requested that the FRA promulgate such a rule just as it—along with the AAR—requested that the FRA promulgate 49 C.F.R. § 218.39. See 49 Fed. Reg. 6495 (1984). Neither has happened.

Moreover, if this Court believed that the SAA mandated the development of automatic self-aligning devices for drawbars, it has had the opportunity to make that interpretation clear and has not so construed the statute.[7]

to change the law after over a century to force railroads to develop technology to align drawbars.

The UTU also makes it a point to note that Congress refused to change Section 2 in 1970. UTU *Amicus* Br. 13-14, 17. However, Congress also did not change Section 2 when it recodified the SAA in 1994, and the modern trend of federal circuit cases holding that there is no SAA violation if a misaligned drawbar is nondefective had begun at that time. *See Reed* v. *Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128 (3d Cir. 1991); *Maldonado* v. *Missouri Pac. Ry.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *cf. United Transp. Union* v. *Lewis*, 711 F.2d 233 (D.C. Cir. 1983). When it last amended the SAA, Congress expresly declared that it did not intend to make any "substantive change in the law" nor did it mean to "impair the precedent value of earlier judicial decisions and other interpretations." H.R. Rep. No. 180, 103d Cong., 2d Sess. 5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 822.

[7] As a component of the Department of Transportation, the Federal Railway Administration has long been empowered to insist

For example, in *Atlantic City R.R.* v. *Parker*, 242 U.S. 56, 59 (1916), the employee plaintiff was injured aligning a drawbar in preparation for a coupling attempt. This Court held that "there was enough evidence to go to the jury" on the question of whether the railroad had furnished couplers as required by the statute. *Id.* This holding, over 20 years after passage of the SAA, precludes respondent's argument that the SAA compels railroads to have self-aligning drawbars. If it was for the jury to decide in *Parker* what amount of lateral play was acceptable, then it follows that *some* amount of lateral play *is* acceptable and drawbars need not be aligned at all times.

Drawbars become misaligned due to necessary lateral play and normal movement of the railcars; they are not thereby defective. They remain in compliance with the SAA, which does not require automatic realignment.

6. The SAA Does Not Provide A Remedy For Every Railroad Employee Injury, But Employees Will Not Be Deprived Of A Remedy If This Court Construes The SAA Not To Cover Respondent's Claim.

Respondent and the UTU repeatedly emphasize that the purpose of the SAA is the protection of railroad employees, Resp. Br. 6, 12-13, 26; UTU *Amicus* Br. 2, 5, and suggest that, if the defense that the equipment was not defective were available in cases like the one here, then the statutory purpose will be defeated. The UTU stresses Congress's implicit policy determination in enacting the SAA that the railroad industry should bear the risks of hazardous but essential railroad duties. UTU *Amicus* Br. 2.

To be sure, the Safety Appliance Act was enacted to protect railroad employees. Resp. Br. 13, 14-17; *Lilly* v. *Grand Trunk W.R.R.*, 317 U.S. 481, 486 (1943). Nevertheless, the SAA does not automatically provide a remedy for all injuries suffered by railroad employees. Otherwise, the FELA would be rendered largely meaningless.

on the development of self-aligning devices if the safety hazards warranted such a requirement. 49 U.S.C. § 20103.

While the SAA aims to protect employees from harm caused by defective safety appliances, it does not follow, as respondent implies, that railroads are insurers of all injuries their employees incur, particularly where railroads have fully complied with the law. Resp. Br. 4. For the most part, proof of railroad negligence is required because the railroad has no cap on liability for recoveries by its employees. See AAR *Amicus* Br. 2 n.1. In sum, general arguments based on notions of "fundamental fairness" may have emotional force for policymakers, UTU *Amicus* Br. 5, 6, but they do not provide a basis for imposing liability in the face of specific statutory language to the contrary.

Adopting petitioner's interpretation will not "carv[e] out an exception to the protection of employees 102 years" after passage of the SAA. Resp. Br. 16. Nor is it accurate to argue that "[t]he health and welfare of [the UTU's] members and their families would be seriously undermined" upon acceptance of petitioner's position. UTU *Amicus* Br. 17. Respondent here sued only under the SAA,[8] thus electing *not* to seek recovery on any theory of petitioner's negligence available to respondent under the FELA. Such a choice was presumably made to avoid the introduction of evidence of contributory negligence that is permissible under the FELA. 45 U.S.C. § 53.

The UTU is incorrect in stating that "Petitioner . . . seeks to eliminate Safety Applicance Act compensation

[8] Strictly speaking, there is no private cause of action under the SAA. *See Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969). Plaintiff's complaint was technically deficient in premising liability solely on the Safety Appliance Act without reference to the FELA.

for those injuries and deaths" caused while adjusting couplers on railcars which were moving or moved unexpectedly. UTU *Amicus* Br. 3. Respondent is similarly incorrect in declaring that "the only way employees would be fully protected," Resp. Br. 16, would be to bar employees from going between cars for "the process of coupling and uncoupling," presumably including preparation that involves the alignment of drawbars. *Id.* at 17. Employees will continue to receive compensation for "injuries inflicted as a result of the Act's violation." *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949). More importantly, these employees unquestionably retain the option of suing for negligence under the FELA.

* * * *

At the end of the day, the accident in this case—a back injury sustained attempting to move a piece of equipment —was not caused by an equipment malfunction or defect, which is necessary to invoke strict liability under the SAA. Respondent's injury is squarely covered by the FELA, but that statute requires employees to prove negligence and it allows railroads to assert contributory negligence as a basis for reducing damages. This Court should not distort the balanced scheme embodied in the SAA and the FELA and allow recovery where it is not required by the plain language of 49 U.S.C. § 20302(a)(1)(A), as conclusively interpreted by this Court in *Affolder*.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, this Court should reverse the judgment on the verdict and remand to the Appellate Court of Illinois, Fifth Judicial District.

Respectfully submitted,

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